

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUSTIN GARDNER,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

8:17CV390

**MEMORANDUM
AND ORDER**

This matter is before the court on the Notices of Appeal ([filing no. 22](#); [filing no. 23](#)) and Motion for Leave to Appeal In Forma Pauperis (“IFP”) ([filing no. 26](#)) filed by Petitioner on November 20 and 21, 2018. Petitioner seeks to appeal the court’s Memorandum and Order and Judgment entered on December 5, 2017, dismissing Petitioner’s habeas petition without prejudice for failure to pay the filing fee or submit a motion to proceed IFP as ordered by the court. (Filing Nos. [4](#) & [5](#).) Also before the court is a memorandum from the Clerk of the Court requesting a ruling as to Petitioner’s authorization to proceed in forma pauperis on appeal. ([Filing No. 24](#).)

A litigant seeking to appeal a judgment must either pay the required filing fees, *see* [Fed. R. App. P. 3\(e\)](#), or proceed in forma pauperis pursuant to [28 U.S.C. § 1915\(a\)](#). “An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.” [28 U.S.C. § 1915\(a\)\(3\)](#). The court hereby certifies that the appeal filed by Petitioner in this case is frivolous and not taken in good faith for the following reasons: (1) Petitioner has already prosecuted an appeal to the Eighth Circuit Court of Appeals in which the Court denied a certificate of appealability and dismissed the appeal on July 31, 2018 ([filing no. 20](#); *see also* [filing no. 21](#)) and (2) Petitioner’s appeal is grossly untimely as it was filed almost one year after this court entered judgment. Since the appeal is not taken in

good faith, Petitioner cannot file an appeal in forma pauperis. *See* [Fed. R. App. P. 24\(a\)\(3\)](#) and [28 U.S.C. § 1915\(a\)\(3\)](#).

IT IS THEREFORE ORDERED that:

1. Petitioner may not proceed on appeal in forma pauperis, and Petitioner's Motion for Leave to Appeal IFP ([filing no. 26](#)) is denied.

2. The clerk of the court is directed to respond to Petitioner's letter ([filing no. 27 at CM/ECF p. 4](#)) and provide him the requested forms.

Dated this 27th day of November, 2018.

BY THE COURT:

s/ Richard G. Kopf
Senior United States District Judge